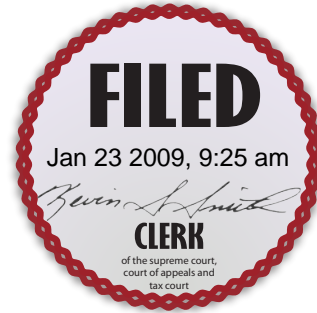


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

NEIL McADAMS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 20A03-0712-CR-574
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0606-FB-00094

JANUARY 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Neil McAdams appeals the trial court's order of restitution. We affirm.

The sole issue for our review is whether the trial court erred in ordering McAdams to pay \$60,000.00 in restitution without determining his ability to pay.

In June 2006, the State charged forty-six-year-old McAdams with three counts of Class B felony arson for knowingly causing fire damage to his mother's home in February 2002, June 2004, and July 2004. McAdams, who admitted causing the fires but denied that he intentionally set them, pleaded guilty to two counts of Class D felony criminal mischief pursuant to the terms of a written plea agreement. At the sentencing hear, McAdams referred in the fires as "careless mistakes," such as leaving too many candles burning. Tr. of sentencing hearing at 7.

Following the sentencing hearing, the trial court sentenced McAdams to three years on each of the two counts, sentences to run concurrently. The court suspended the entire three-year sentence to three years of probation and ordered McAdams to pay fines and costs. The court also ordered him to pay \$60, 0000.00 in restitution for one of the fires. Specifically, the court explained as follows:

I'm going to order you to make restitution. Now, I believe that uh, the amount of the restitution as set out in the Victim Impact Letter was \$60,000.00. . . . Uhm, to the extent that money's owed and so I'm going to leave that to the insurance company. What they decide to do to pursue it is going to be their matter once you are through with probation. You obviously aren't going to pay sixty thousand dollars (\$60,000.00) while on probation and I don't expect you to.

Sentencing Hearing Tr. At 10. The court asked McAdams if he had any objection to the amount of the restitution, and McAdams responded that he did not.

McAdams now argues that the trial court erred in ordering him to pay the restitution without inquiring into his ability to pay. The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008). Restitution also serves to compensate the offender's victim. *Id.* When the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant's ability to pay. *Id.* (citing Indiana Code Section 35-38-2-2.3(a)(5)). This is so in order to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant's inability to pay restitution. *Id.*

However, a trial court may also order restitution as part of a defendant's sentence wholly apart from probation. *Id.* at 772-73. And when restitution is ordered as part of an executed sentence, an inquiry into the defendant's ability to pay is not required because in such a situation, restitution is merely a money judgment and a defendant cannot be imprisoned for non-payment. *Id.* at 773.

In *Pearson*, the Indiana Supreme Court noted that even if the order of restitution was not a part of probation, the order was clearly not a part of the executed term of Pearson's sentence because Pearson's sentence was suspended in total. The Court explained that just as with probation, a suspended sentence may be revoked if the probationer has willfully refused to pay or has failed to make a sufficient bona fide effort

to acquire the resources to pay, and the court may revoke probation and sentence the defendant to prison. *Id.* at 773. The Court quoted *Ladd v. State*, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999), to further explain that “when restitution is ordered as a condition of probation *or a suspended sentence*, the trial court must inquire into the defendant’s ability to pay in order to prevent indigent defendants from being imprisoned because of their inability to pay.” (Emphasis added).

Here, however, our review of the trial court’s comments regarding the restitution in this case reveals that the court does not expect McAdams to pay the restitution during the three-year period that his sentence is suspended and he is on probation. Rather, the court left it to the insurance company that insured McAdams’ mother’s house to pursue the restitution, if it so chooses, after McAdams has completed his probation. Under these circumstances, where McAdams cannot be imprisoned for non-payment, the trial court did not commit reversible error in failing to inquire into McAdams’ ability to pay the restitution.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.